STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 22

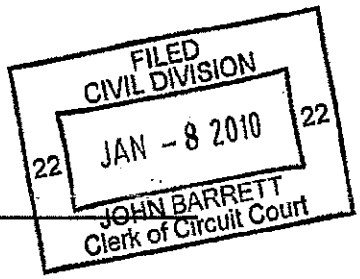
BRADLEY DALL,

Petitioner,

v. Case No.: 09 CV 10745

CITY OF MILWAUKEE
FIRE AND POLICE COMMISSION,

Respondent.



DECISION AND FINAL ORDER

INTRODUCTION

Petitioner Bradley Dall seeks review and relief by this court from a decision issued by the Board of Fire and Police Commissioners of the City of Milwaukee ("the Board"). The petitioner's requested relief is two-fold: a statutory review of the Board's application of the seventh "good cause" element, and a certiorari review of the entirety of the Board's entire decision.

On October 27, 2008, Milwaukee Police Chief Edward Flynn ordered the petitioner be suspended for 30 days for inappropriate conduct. Hearing examiner John Carter recommended reducing the suspension to 21 days after a December 9, 2008, hearing. The Board concluded that both Chief Flynn's and the hearing examiner's recommendations were insufficient; the Board suspended the petitioner for 60 days without pay and demoted him from the rank of sergeant to the rank of police officer.

The petitioner filed his summons and complaint on July 9, 2009, and this court set a briefing schedule shortly thereafter. The petitioner filed his brief on September 3,

2009, and the Board filed its response brief on October 2, 2009. The petitioner filed his reply brief on October 13, 2009, thus making the record before this court complete on that date.

BACKGROUND

The petitioner faced disciplinary proceedings for making inappropriate sexual comments to female subordinates. After considering all the evidence, the hearing officer made the following findings of fact, which were accepted by the Board:

1) Police Sergeant Bradley R. Dall, at all times pertinent hereto, was a member of the Milwaukee Police Department and bound by the rules and procedures thereof.
2) On October 21, 2007, Sergeant Dall reset a computer password for Police Officer Jessica A. Kowaliak so that it read "Jessica 69."
3) On October 31, 2007, Sergeant Dall made an inappropriate sexual gesture (sticking his tongue out between two fingers) to Office [sic] Kowaliak while at the scene of an armed robbery.
4) On May 14, 2008, while in the assembly at the Fourth District Police Station, Sergeant Dall made inappropriate comments involving oral sex to Officer Kowalik.
5) On an unspecified date, Sergeant Dall told Officer Kowalik that her butt looked better in civilian clothes than it did when she wore her uniform.
6) On an unspecified date, Sergeant Dall asked Officer Kowalik if she would ever cheat on her husband.
7) On an unspecified date, Sergeant Dall asked Police Officer Susan Stirmel if she had had sex while she was on vacation.
8) On an unspecified date in the District Four assembly room, Sergeant Dall made an inappropriate sexual gesture (sticking his tongue out between two fingers) to Officer Stirmel.
9) In June of 2007, Sergeant Dall told Police Officer Tracey Geniesse that she looked "hot."
10) On an unspecified date, Sergeant Dall called Officer Geniesse a "bitch."
11) On April 2, 2008, Sergeant Dall told Officer Geiesse that he had driven by her house, looked in the windows, and watched her walk around naked.
12) On May 20, 2008, Sergeant Dall asked Officer Geniesse if she had injured her neck by drinking beer and jumping around naked on a trampoline at a birthday party.

The hearing officer concluded that the testimony of officers Geniesse, Stirmel, and Kowalik was sufficient to establish that the petitioner spoke inappropriately to other officers, but he concluded that there was insufficient evidence to find that the petitioner had any inappropriate physical conduct with any other officers. The Commission accepted these conclusions of law.

The hearing examiner next concluded that the 30-day suspension applied Chief Flynn was fair and not discriminatory. He concluded that the discipline reasonably related to the seriousness of the violation and to the officer's service record with the department. The hearing examiner then concluded that while the 30-day suspension was fair and reasonable, a 21-day suspension broken into three separate seven-day suspensions would be more proportional to the proven conduct.

The Board rejected both the Chief's ordered 30-day suspension and the hearing examiner's recommended 21-day suspension. The Board found that the petitioner's position as a supervisor, his pattern of inappropriate conduct over an extended period of time, and his directing this conduct at more than one subordinate were aggravating factors necessitating a more substantial penalty. Therefore, the Board imposed a suspension of 60 days without pay and a demotion from the rank of Police Sergeant to the rank of Police Officer.

STANDARD OF REVIEW

Wis. Stat. § 62.50(17)(b) provides that no police officer may be suspended without pay or reduced in rank, except for just cause. In determining just cause, the Commission must make its findings in writing and consider:

1. Whether the subordinate could reasonably be expected to have knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discovery whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3 is reasonable.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Pursuant to § 62.50(20), the petitioner seeks review of the Board's decision regarding the seventh factor. § 62.50(21) establishes that this court's review of this question is limited to asking: "Under the evidence is there just cause, as described in subd. (17)(b), to sustain the charges against the accused?" Therefore, this court will only determine whether there was sufficient evidence to sustain the Board's finding that the suspension and demotion reasonably relate to the seriousness of the offense and the petitioner's record of service.

The petitioner also seeks certiorari review of the Board's entire decision. Review on certiorari is limited to the following questions: "(1) Whether the board kept within its jurisdiction, (2) Whether it acted according to law, (3) Whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) Whether the evidence was such that it might not reasonably make the order or determination in question." *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63(1978).

ANALYSIS

The petitioner argues that the Board's decision does not comply with the seventh standard of "just cause" as defined by the statute, requiring a finding that the proposed discipline reasonably relates to the seriousness of the violation and the petitioner's record of service. In support of his position, the petitioner argues that the Board ignored the hearing examiner's recommendation although he cites no authority requiring that the Board follow the hearing examiner's recommendation. The petitioner also argues that the Board ignored the record before it, but the Board's decision makes it clear that it carefully considered the record.

The crux of the petitioner's argument is that two other officers received lighter punishments for similar offenses. At the hearing, Chief Flynn testified that he had given a lieutenant a five-day suspension for making sexually suggestive remarks. Chief Flynn also testified that this was a reduced punishment from the original 10 days because the lieutenant agreed to settle the matter without a hearing, something the petitioner in this case did not do. Chief Flynn also testified that the nature of the petitioner's conduct was more egregious.

The court does not have the case file of previous disciplinary proceedings before it, and it will not second-guess the Board's acceptance of Chief Flynn's conclusion that the petitioner's conduct was more egregious than previous offenders. Furthermore, the petitioner argues in his reply brief that because an officer had previously received a five-day suspension, the Board had no legal basis to mete out a more severe punishment. He provides no authority for the proposition that the Board is forever bound by previous punishments that were accepted without a hearing. Furthermore, such an argument is

absurd, as it would strip the Board of any discretion to ever issue different punishments for different circumstances.

The court must determine whether the evidence indicates that the punishment was reasonably related to the violation and the petitioner's service record. The evidence shows that the petitioner made inappropriate sexually suggestive remarks and gestures toward three female officers, all of whom were subordinate to him and two of whom he had supervisory authority over. That an officer previously settled the allegations against him for a lesser punishment than the petitioner received does not change that the suspension and demotion ordered by the Board reasonably relates to the offense and to the petitioner's service record.

On certiorari review, the court is limited to determining whether the Board kept within its jurisdiction; whether it acted according to law; whether its determination was arbitrary, oppressive, or unreasonable; and whether sufficient evidence supported the determination. The petitioner argues that because the Board acted unreasonably, it did not keep within its jurisdiction. Such argument is nonsensical. This controversy was properly before the Board, and it issued a punishment permitted by the statute. An unreasonable punishment must be overturned, but such unreasonableness does not necessitate a finding that the decision was outside the Board's jurisdiction.

Having already determined that the Board did in fact comply with the seventh standard for just cause, the court has no basis for finding that the decision was contrary to law. Additionally, the Board's decision was not arbitrary, oppressive, or unreasonable. The petitioner argues that the Board did not provide a rational basis for its decision. However, the Board is not required to produce a tome detailing each and every thought

the members had in arriving at its conclusion. Its findings of fact and conclusions of law set forth a rational basis for its decision. Finally, the record contains sufficient evidence to support the Board's finding. The court need not determine whether it would have given the same punishment had it heard the evidence, but rather, it need only determine whether the evidence presented provided a reasonable basis for the Board's findings. The court is satisfied that the evidence provided a reasonable basis for the suspension and demotion.

CONCLUSION

Based on the record, briefs and arguments of the parties, this court finds that the decision to demote petitioner from the rank of sergeant to the rank of police officer was based upon the evidence, was reasonable, and was not based upon an incorrect legal theory.

Accordingly, IT IS ORDERED that the decision of City of Milwaukee Police and Fire Commission is **AFFIRMED.**

Dated this 8 day of January, 2010, in Milwaukee, Wisconsin.

BY THE COURT:

The Honorable Timothy Witkowiak
Milwaukee County Circuit Court, Branch 22

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL